Supreme Court, U.S.
FILED

941085 DEC 19 1994

OFFICE OF THE CLERK

No.____

IN THE

Supreme Court of the United States

October Term, 1994

BEVERLY LESNICK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY S. LESNICK,
Petitioner,

v.

HOLLINGSWORTH & VOSE COMPANY,
Defendant-Respondent,

and

LORILLARD, INC.,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

*Steven J. Cooperstein, Esquire
Howell K. Rosenberg, Esquire
BROOKMAN, ROSENBERG, BROWN & SANDLER
30 S. 15th Street, 17th Floor
Philadelphia, PA 19102
(215) 569-4000

Marc Seldin Rosen, Esquire
SCANLAN & ROSEN, P.A.
210 East Redwood Street, 3rd Floor
Baltimore, MD 21202
(410) 244-1155

Attorneys for Petitioner Beverly Lesnick

**Counsel of Record*

PACKARD PRESS® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

45pp

QUESTION PRESENTED FOR REVIEW

Did the court of appeals err in affirming dismissal, for lack of personal jurisdiction in Maryland, of a defendant Massachusetts corporation that manufactured an asbestos-containing component part of an injury-causing cigarette filter, when: (1) the defendant actively participated in design of the filter, owned the patent on the filter jointly with the cigarette manufacturer, sold the filter component it made exclusively to the cigarette manufacturer, supplied all of the manufacturer's needs for the component, knew that the manufacturer planned national advertising and distribution, and derived direct financial benefit from each sale of a finished cigarette; (2) the cigarette's distributor sold ten billion cigarettes nationally, including millions in Maryland; (3) plaintiff's decedent purchased hundreds of packs of the cigarettes in Maryland; and (4) the court found that the defendant placed the component in the stream of commerce and engaged in "additional conduct" as defined by the plurality in *Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County,* 480 U.S. 102 (1987), but held that exercise of personal jurisdiction in Maryland would deprive the defendant of due process of law because there was no showing that the manufacturer's "additional conduct" was specifically directed toward Maryland?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions And Statutes Involved	2
Statement Of The Case	2
Argument	5
I. The Opinion Of The Circuit Court Of Appeals Is In Conflict With Opinions From Other Circuit Courts	6
II. The Holding Of The Circuit Court Of Appeals Constitutes A Gross Departure From The Standards Governing The Constitutional Exercise Of Personal Jurisdiction	7
Conclusion	11
Appendix:	
Opinion of Circuit Court, decided September 19, 1994	1a
Order of Circuit Court, filed October 18, 1994	16a
Opinion of District Court, dated April 13, 1993	17a

TABLE OF AUTHORITIES

Cases: Page

Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County, 480 U.S. 102 (1987) .. 7, 8, 9

Burger King v. Rudzewicz, 471 U.S. 462 (1985).....9, 11

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 7

Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta, 553 F.Supp. 328 (E.D. Pa. 1982) . 9

Tobin v. Astra Pharmaceutical Products, Inc., 993 F.2d 528 (6th Cir.), *cert. denied.,* 114 S.Ct. 304 (1993)...6, 11

Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir.), *cert. denied,* 113 S.Ct. 2334 (1993) 6

World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)..... 7, 8

No. ___

IN THE

Supreme Court of the United States

October Term, 1994

BEVERLY LESNICK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY S. LESNICK,
Petitioner,

v.

HOLLINGSWORTH & VOSE COMPANY,
Defendant-Respondent,

and

LORILLARD, INC.,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated September 19, 1994, is reported as follows: *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, *rehearing denied* (4th Cir. 1994). The memorandum and order of the United States District Court for the District of Maryland, dated April 14, 1993, is unreported and unpublished. Both are included in the Appendix hereto.

STATEMENT OF JURISDICTION

Petitioner seeks grant of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit dated September 19, 1994, which affirmed the dismissal of

defendant Hollingsworth & Vose Co. for lack of personal jurisdiction. By order dated October 18, 1994, the court denied a Petition for Rehearing with Suggestion for Rehearing In Banc. This Court has jurisdiction to review the circuit court's judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 14, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Maryland Courts and Judicial Proceedings Code § 6-103(b)(4) provides in pertinent part:

> A court may exercise personal jurisdiction over a person, who directly or by an agent: . . . [C]auses tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State; . . .

STATEMENT OF THE CASE

Petitioner, Beverly Lesnick, seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the dismissal of defendant Hollingsworth & Vose Company ("H&V") for lack of personal jurisdiction. Mrs. Lesnick instituted this action on December 4, 1991, with the filing of a complaint seeking damages for personal injuries to her late husband, Stanley Lesnick. Jurisdiction in the district court was

founded on 28 U.S.C. §1332(a), as there existed complete diversity of citizenship among the parties and the amount in controversy exceeded $50,000.00. The complaint alleged that Mr. Lesnick smoked Kent cigarettes in the early nineteen fifties, when Kent's filters contained asbestos. As a result of that asbestos exposure, Mr. Lesnick developed mesothelioma, a cancer that caused his death on November 21, 1989.

At the time of Mr. Lesnick's death, both he and his widow, plaintiff herein, were residents of Baltimore County, Maryland. Mrs. Lesnick filed suit in the United States District Court for the District of Maryland, naming as defendants Lorillard, Inc. ("Lorillard"), and H&V. The complaint alleged that Lorillard, a New York corporation, whose principal place of business was in New York, manufactured and distributed the Kent cigarettes. A subsidiary of H&V, a corporation that was incorporated and maintained its principal place of business in Massachusetts, manufactured and sold to Lorillard the asbestos-containing filter material that Lorillard integrated into its cigarettes.

After Mrs. Lesnick filed an amended complaint, H&V moved to dismiss for lack of personal jurisdiction. H&V's dismissal motion was accompanied by an affidavit signed by Paul Walker, Director of Regulatory Affairs for H&V. Mr. Walker stated that a wholly-owned subsidiary of H&V, H&V Specialties Co., Inc. ("Specialties"), was incorporated in February 1952, and merged into H&V in 1957. In February 1952, after its incorporation, Specialties contracted with Lorillard to manufacture filter media for use in Kent's filters. Specialties manufactured the filter media in its plant in Massachusetts from early 1952 until May 1956. It shipped the filter media to Lorillard's manufacturing sites in New Jersey and Kentucky. Mr. Walker swore that Specialties did not design the filter media "for the market in Maryland," had no customers in Maryland, and did not establish channels for advertising, distributing its product, or servicing customers in Maryland.

Mrs. Lesnick's response included as exhibits various documents in support of her position that the court had personal jurisdiction over H&V. Those documents included the February 14, 1952, contract between Specialties and Lorillard referenced in Mr. Walker's affidavit (the "Agreement"). That Agreement

shows that Specialties and Lorillard acted together to research and develop the asbestos-containing filter media and jointly owned patents subsequently issued for the filter. They bound themselves to share all knowledge they might acquire with regard to improvements in the filtering of tobacco products. They agreed to share equally all costs incurred from September 1, 1950, in developing the filter material and in establishing the facilities and equipment necessary for production of the filter media. The parties jointly owned the equipment thus purchased. Specialties agreed that, for at least five years, it would sell its filter material only to Lorillard, and would supply all of Lorillard's needs for the material. Lorillard agreed to indemnify Specialties for all damages, costs, expenses and liabilities arising from any harmful effects of Lorillard's cigarettes.

Other documents submitted established that Lorillard engaged in a nationwide marketing campaign, including advertisements in magazines with national circulations, and on network television. The advertising focused specifically on Kent's then new, exclusive, and supposedly highly-efficient, yet dust-free filter. Lorillard unveiled its new product at a luncheon in New York. It disclosed at that time that Lorillard had developed the new filter in close cooperation with H&V, and that H&V's technical director had worked on the filter material with the Naval Research Laboratory during World War II. Further, Lorillard disclosed that an affiliate of H&V would supply the filter material for Kent cigarettes.

H&V's affiant, Paul Walker, testified in a prior deposition that at the time the Agreement was signed in 1952, H&V was fully aware that Lorillard intended to put the filter media into Kent cigarettes, to advertise the product with special emphasis on the filter, and to sell the cigarettes to the public. During the life of the Agreement, H&V placed one of its researchers full time with Lorillard. An internal H&V memorandum shows that H&V worked with Lorillard to correct problems with the "draw" of the filtered cigarettes. H&V recognized that certain changes would be necessary if Kent were " . . . to be any more than a small seller . . .". Mr. Walker also testified that when H&V made decisions regarding design of the filter media, jointly with

Lorillard, it took into consideration Lorillard's wishes ". . . in connection with customer acceptance of the product."

The parties' joint efforts helped Lorillard to sell and distribute vast quantities of Kent cigarettes in Maryland, where Stanley Lesnick bought them. In all, Lorillard sold to consumers nationwide more than ten billion (10,000,000,000) cigarettes containing H&V's filter media. Under Specialties' Agreement with Lorillard, Specialties received payment based on a multiplier of its costs for every filter media sold to Lorillard. H&V derived substantial revenue from the sale of Kent cigarettes in Maryland.

On January 5, 1993, the Honorable Frank A. Kaufman held a non-evidentiary hearing on the dismissal motion. On April 13, 1993, Judge Kaufman issued a Memorandum and Order, granting H&V's motion to dismiss. Thereafter, Mrs. Lesnick moved Judge Kaufman to issue an order entering judgment under F.R.Civ.P. 54(b). Neither defendant opposed the motion. On June 18, 1993, Judge Kaufman granted the motion, found that there was no just reason for delay, entered final judgment in favor of H&V, and stayed the litigation pending the outcome of the appeal. By Opinion dated September 19, 1994, the United States Court of Appeals for the Fourth Circuit affirmed. On October 18, 1994, the court denied Mrs. Lesnick's Petition for Rehearing with Suggestion for Rehearing In Banc.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Allowance of the writ of certiorari is imperative to resolve a conflict in the Circuit Courts of Appeals and to rectify the judgment of the court below, which imposes an intolerable restriction on a state's ability to exercise jurisdiction over a nonresident corporation. Both the Circuit Court of Appeals for the Fourth Circuit and the District Court for the District of Maryland recognized that the defendant herein, Hollingsworth & Vose Co. ("H&V"), was intimately involved in the design and development of a cigarette filter. Likewise, both courts found that H&V derived substantial financial benefit from the cigarette manufacturer's nationwide sales of the cigarettes into which

H&V's product, the filter media, was incorporated. Nevertheless, the courts believed that because H&V did not have any direct contact with Maryland, exercise of personal jurisdiction over H&V would not comport with due process. Because cases from other Circuit Courts of Appeals have held, and justice and logic demand, that a defendant's active involvement in the nationwide distribution of a product that causes injury in the forum state be a constitutionally sufficient basis upon which to exercise jurisdiction in the forum, grant of certiorari is required.

I. THE OPINION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH OPINIONS FROM OTHER CIRCUIT COURTS

The Circuit Court of Appeals held that, although H&V engaged in "additional conduct" beyond merely placing its filter media in the stream of commerce, jurisdiction over H&V in Maryland would not comport with due process because H&V engaged in no conduct specifically directed toward Maryland. The court failed to discuss persuasive authority from other Circuit Courts of Appeals that actions taken by a defendant that may be said to constitute purposeful availment of the markets in all states establishes jurisdiction in each state. In *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir.), *cert. denied*, 114 S.Ct. 304 (1993), the court rejected a defendant's argument ". . . that it has done nothing in particular to purposefully avail itself of the Kentucky market as distinguished from any other state in the union." 993 F.2d at 544. The court held that a drug manufacturer's decision to have its drug marketed in all fifty states, even though it did not itself set up a distribution system, established jurisdiction in each state. Similarly, in *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir.), *cert. denied*, 113 S.Ct. 2334 (1993), the court held that evidence that an automobile manufacturer modified its cars for the entire American market was sufficient to establish jurisdiction over it in a state in which another entity distributed the cars.

Here, the opinion of the court below directly conflicts with these holdings. The court recognized that the written submissions showed that H&V and the cigarette manufacturer, Lorillard, cooperated closely in bringing the asbestos-containing cigarette to market and in attempting to make the cigarette successful. The court found explicitly that H&V's actions pursuant to the contract between H&V and Lorillard represented "additional conduct" of the type set forth in the plurality opinion in *Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County,* 480 U.S. 102 (1987). H&V knew of and benefitted from Lorillard's national sales of the cigarettes, including those in Maryland. Yet, the court rejected a Maryland court's ability to exercise jurisdiction, holding that proof of action directed toward Maryland was necessary. This is a requirement explicitly rejected in the above-cited cases. This conflict requires review and resolution by this Court.

II. THE HOLDING OF THE CIRCUIT COURT OF APPEALS CONSTITUTES A GROSS DEPARTURE FROM THE STANDARDS GOVERNING THE CONSTITUTIONAL EXERCISE OF PERSONAL JURISDICTION

Grant of the writ of certiorari is also warranted because the holding of the court below grossly departs from the last fifty years of case law in the area of personal jurisdiction. At least since the decision in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), this Court has analyzed the problem of the constitutionality of a state's exercise of personal jurisdiction over a nonresident defendant in terms of whether the defendant had "minimum contacts" with the forum state. In cases decided since *International Shoe,* the Court has wrestled with varying ways to formulate a test that will allow an accurate assessment of whether any particular defendant has sufficient contacts with the forum to permit the exercise of jurisdiction. In the most common expression of the test, this Court has held that the "minimum contacts" test is satisfied if the defendant has "purposefully availed" itself of the privilege of doing business in the forum state. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980).

There has been some disagreement about the level of conduct that will be required before a court can conclude that a nonresident corporation has sufficiently acted with a purpose to avail itself of a forum's market. The most recent analysis of the issues is contained in *Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County, supra.* There, a plurality of this Court set forth a test requiring a defendant to have engaged in some "additional conduct" indicating an intent to serve the forum market over and above the mere placement of a product in the stream of commerce. The court below here, while finding that H&V had engaged in one of the examples of "additional conduct" set forth in *Asahi,* namely the designing of the product for national distribution, held that due process requires that H&V have engaged in conduct directed to serve the Maryland market specifically. This holding is far beyond any construction of the due process clause made by this Court or any other court.

The lower court opinion, at bottom, erects a requirement that a defendant purposefully avail itself *directly* of the market in the forum state. In so doing, the court abandons the well-established principle that a state may properly exercise jurisdiction over a nonresident defendant who serves the forum market indirectly. It fails to adhere to that principle even though this defendant's intent to serve the market in the forum is crystal clear. A principle of law requiring personal jurisdiction to be founded on direct contact only with the market in the forum state runs roughshod over this Court's jurisprudence and would wreak havoc with a state's ability to offer the opportunity of full relief from injury to its citizens.

This Court noted in *World-Wide Volkswagen Corp. v. Woodson, supra,* that jurisdiction may be founded on a party's efforts to serve **directly or indirectly** the market for its product in other states. 444 U.S. at 297. While the Court was careful to rule that jurisdiction cannot be based on the unilateral activities of third persons, that consideration is nonexistent here, as Mr. Lesnick purchased the cigarettes in Maryland as a result of H&V's joint efforts with Lorillard to bring the asbestos-containing filter cigarette to market in each state,

including Maryland. Similarly, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985), this Court noted that the contacts need only "proximately result" from actions by the defendant, and emphasized that the defendant's territorial presence in the forum is not required. These formulations are in direct contrast to the lower court's apparent requirement of direct action by the defendant to inject itself into the forum market.

Further, it is plain that the plurality opinion in *Asahi* would not hold that jurisdiction must be based on a direct connection with the forum. To the contrary, the principle drawn from the *Asahi* plurality continues to be that the evidence must show that the defendant acted with an intent or purpose to serve the market in the forum state, not that the defendant initiated contact with the forum. 480 U.S. at 112. The design of a product in anticipation of sales in the forum, which is proven beyond doubt in the instant case, establishes the necessary purpose to serve the forum state under the test of the *Asahi* plurality.

Indeed, the *Asahi* plurality cites with approval *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F.Supp. 328 (E.D.Pa. 1982), as an example of jurisdiction based on a party's design of a product in anticipation of sales in the forum state. *Asahi*, 480 U.S. at 113. In *Rockwell International*, a foreign corporation that designed and manufactured ball bearing assemblies sought dismissal of a suit based on the malfunction of one of its assemblies that had been installed in a helicopter. The defendant worked closely with the helicopter manufacturer in custom designing a ball bearing assembly for use in the helicopter. The defendant sought dismissal, claiming that because the sales of its component part were confined to the foreign market, it had not established minimum contacts with the forum. In denying the motion to dismiss, the court noted that the defendant's decision to enter the international transportation market and its work to custom make a part that would be used exclusively in the seller's helicopters established that the defendant had purposefully availed itself of the forum market. The court observed that the critical involvement of the defendant for "minimum contacts" purposes occurred some steps prior to distribution of the finished product. 553 F.Supp. at 331.

It is a similar early involvement of H&V here that establishes H&V's intent to take advantage of the Maryland market, an involvement to which the court below attaches insufficient weight.

The court below recognized that H&V consciously decided to exploit the national cigarette market by designing a filter jointly with Lorillard, exclusively for integration into Lorillard's cigarettes. The court's holding, that this conduct by H&V does not demonstrate sufficient intent to purposefully avail itself of the forum market, has added an intolerable obstacle to a state's exercise of jurisdiction over a nonresident manufacturer. The test set forth by the lower court is not whether the defendant acted with a purpose to avail itself of the privilege of doing business is the forum, but rather, it is whether the defendant consciously directed conduct toward the forum state.

The result of that holding is to erode a state's ability to afford its citizens the opportunity of obtaining complete compensation and relief from torts committed upon them. The situation involved herein is quite common. The plaintiff has sued the manufacturer of a finished product and the manufacturer of one of the product's component parts because the component part was defective. The part caused injury to a consumer who bought and used the finished product in the forum state. The finished product was demonstrably the result of joint, cooperative efforts by the two manufacturers, and the component manufacturer had a direct interest in the sales of the finished product. The finished product was sold in Maryland by the millions.

Certainly, a consumer has every expectation that he may bring suit against each of these two tortfeasors in the forum of his residence. He must be able to attempt to hold them jointly liable, just as they jointly brought the offending product to market. Likewise, a state must be able to protect its citizens by permitting them to seek full redress for harms done to them by products knowingly and deliberately marketed in the forum state. Yet, the court below held that a tort victim cannot fully vindicate his rights in his forum of residence. This result is contrary to all reason and justice. Indeed, it runs afoul of this Court's admonition that the due process clause may not be used

". . . as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King v. Rudzewicz*, 471 U.S. at 474.

Further, the decision may make it even more difficult for tort victims to obtain redress for wrongs, as any manufacturer could insulate itself from being sued anywhere but its place of residence simply by using an independent national distributor to market its products. *See Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d at 544. Grant of the writ of certiorari is imperative here so that this Court can establish that a manufacturer of an injurious product is amenable to suit in any forum in which injury occurred when the manufacturer purposefully availed itself of the privilege of doing business in every state in the nation.

CONCLUSION

For the foregoing reasons, Petitioner, Beverly Lesnick, respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

BROOKMAN, ROSENBERG, BROWN AND SANDLER

By: _____

Steven J. Cooperstein
Howell K. Rosenberg

Marc Seldin Rosen
SCANLAN & ROSEN, P.A.

Attorneys for Petitioner,
Beverly Lesnick

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BEVERLY LESNICK, Individually and as Personal Representative of the Estate of Stanley S. Lesnick, *Plaintiff-Appellant,*	)	
v.	)	
	)	No. 93-1820
HOLLINGSWORTH & VOSE CO., *Defendant-Appellee,*	)	
and	)	
LORILLARD, INC., *Defendant.*	)	

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frank A. Kaufman, Senior District Judge.
(CA-91-3427)

Argued: May 9, 1994

Decided: September 19, 1994

Before MURNAGHAN and NIEMEYER, Circuit Judges, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Murnaghan and Judge Hilton joined.

COUNSEL

ARGUED: Howell Kenneth Rosenberg, BROOKMAN, ROSENBERG, BROWN & SANDLER, Philadelphia, Pennsylvania, for Appellant. Andrew James McElaney, Jr., NUTTER, MCCLENNEN & FISH, Boston, Massachusetts, for Appellee. **ON BRIEF:** Steven J. Cooperstein, BROOKMAN, ROSENBERG, BROWN & SANDLER, Philadelphia, Pennsylvania; Mark S. Rosen, SCANLON & ROSEN, P.A., Baltimore, Maryland, for Appellant. Stephen J. Brake, NUTTER, MCCLENNEN & FISH, Boston, Massachusetts, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

After her husband died from lung cancer, Beverly Lesnick instituted this action in the District of Maryland, alleging that the filters in Kent brand cigarettes manufactured by defendants Lorillard, Inc., and Hollingsworth & Vose Co. were the cause of her husband's death. In particular, she alleged that his death was caused by asbestos incorporated by the defendants into Kent brand cigarettes' "Micronite filter" between 1952 and 1956. Hollingsworth & Vose, a Massachusetts corporation which manufactured the filter material in Massachusetts and shipped it to Lorillard's plants in Kentucky and New Jersey, filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2) on the grounds that it did not have sufficient contacts with the state of Maryland for a Maryland court to assert personal jurisdiction over it. The district court granted the motion to dismiss, and we affirm.

I

Stanley Lesnick, a Maryland resident, smoked approximately one and one-half to two packs of cigarettes each day from the 1940's until he quit smoking in the early 1970's, and he smoked Kent brand cigarettes from the time they were introduced on the market in the early 1950's until he quit. Lesnick purchased most of his cigarettes from retail stores in the state of

Maryland. In May 1989, Lesnick was diagnosed with mesothelioma, a form of lung cancer. His doctor concluded that the cancer was caused by inhalation, not of the tobacco smoke, but of crocidolite asbestos, which was incorporated in the Kent cigarettes' filters in the early 1950's. Lesnick's condition was diagnosed as fatal, and on November 21, 1989, he died.

Beverly Lesnick, Stanley's wife, filed this diversity action in December 1991 in her individual capacity and as the representative of Stanley Lesnick's estate, naming as defendants Lorillard, Inc., a New York corporation with its principal place of business in New York, and Hollingsworth & Vose Co., a Massachusetts corporation with its principal place of business in Massachusetts. The amended complaint alleged that from March 1952 to May 1956, Lorillard manufactured Kent cigarettes with the "Micronite Filter," which contained crocidolite asbestos. The filter medium was manufactured by Hollingsworth & Vose in Massachusetts and was then shipped to Lorillard's cigarette manufacturing plants in Kentucky and New Jersey where it was incorporated into the cigarettes. Between 1952 and 1956, Hollingsworth & Vose provided Lorillard with material for approximately 10 billion asbestos-containing filters which were incorporated into cigarettes marketed and distributed by Lorillard throughout the nation. In her complaint, Beverly Lesnick alleged that the defendants knew or should have known of the dangers of crocidolite asbestos at the time the cigarettes and filters were manufactured, but that they failed to make improvements in them or to warn the public of these dangers. She based her claims on Maryland theories of negligence, strict liability, fraudulent misrepresentation, negligent misrepresentation, and breach of express warranty, and she demanded $2 million in damages.

Hollingsworth & Vose filed a motion to dismiss for lack of personal jurisdiction. It recognized that Maryland authorizes long-arm jurisdiction to the full extent allowed under the Due Process Clause of the Fourteenth Amendment, *Mohamed v. Michael*, 370 A.2d 551 (Md. 1977), but it argued that under the reasoning of the Supreme Court plurality in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987),

jurisdiction may not be asserted over an out-of-state manufacturer of products placed into the stream of commerce, where the manufacturer's only connection with the forum state is its knowledge that the products will eventually be sold there. Hollingsworth & Vose acknowledged that, when it sold the material for cigarette filters to Lorillard, it placed the material in commerce knowing that it would eventually be sold in Maryland as a component of Kent cigarettes; however, it argued that under *Asahi*, mere knowledge is not enough to establish personal jurisdiction, and its activity must have been purposefully directed toward Maryland.

In support of her argument that Hollingsworth & Vose should be subject to Maryland's long-arm jurisdiction, Beverly Lesnick argued first that language in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980), which appears to require only that a defendant place a product "into the stream of commerce with the expectation that [it] will be purchased by consumers in the forum State," should control, and based on admissions from Hollingsworth & Vose, Maryland's jurisdiction over Hollingsworth & Vose is properly asserted. Even assuming that *Asahi* is read to make the standard more demanding, Lesnick argued, jurisdiction would nevertheless be proper because Hollingsworth & Vose was "no mere supplier of component parts." Rather, it "bound itself to work in virtual partnership with Lorillard to develop a filter for general distribution through integration into Lorillard's cigarettes." Lesnick contended that Hollingsworth & Vose should be imputed with Lorillard's clearly adequate contacts with Maryland because it "purposefully availed itself of the privilege of conducting business, through Lorillard's sales, in the entire United States."

The district court rejected the argument that Hollingsworth & Vose's ties to Lorillard were sufficient to establish jurisdiction, though it acknowledged that Hollingsworth & Vose was an important, perhaps even vital, supplier to Lorillard. The court stated, "Hollingsworth & Vose Company is not engaged directly, as is Lorillard, in bringing the alleged offending product into Maryland, or doing anything with respect to Maryland, other than supplying its product to defendant Lorillard in a state other than Maryland." The court granted Hollingsworth &

Vose's motion to dismiss under Federal Rule of Civil Procedure 12(b)(2) and entered final judgment in its favor under Federal Rule of Civil Procedure 54(b). This appeal followed.

II

While the jurisprudence of personal jurisdiction has focused on fixing the minimum measurement of a person's contact with a state necessary to substitute for the person's presence in the state and thus to justify that state's imposing an *in personam* judgment over the person, the immediate concept of "presence" is no longer part of the language. Nevertheless, the establishment of a surrogate for presence has been the core task in defining the due process boundaries of a state's legitimate exercise of sovereignty over a person beyond its borders. A historical review of the scope of a state's jurisdictional power thus provides an insight into the Supreme Court's efforts in articulating a standard for long-arm jurisdiction.

It remains well-established that a state's sovereignty over persons, property and activities extends only within the state's geographical borders and that therefore its laws have no operation in another state except as allowed by the other state or by comity. *See Pennoyer v. Neff*, 95 U.S. 714, 720-22 (1878). This root principle is inherent in our system of federalism. As the Court in *Pennoyer* stated:

> The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Id. at 722. The Court noted that the assertion by one state of jurisdictional power in violation of these principles would be "an illegitimate assumption of power," *id.* at 720, and would not constitute due process of law in violation of the Fourteenth Amendment. *Id.* at 733.

Preserving the notion that only a person *present* in a state can be subjected to an *in personam* judgment there, the Court later concluded that corporations, even though previously thought to be present only where incorporated, were present in states where their authorized agents conducted the corporations' activities. *St. Clair v. Cox*, 106 U.S. 350 (1882). In *St. Clair*, the Court upheld a Michigan statute that permitted a foreign corporation to be sued in the state as a condition of that corporation's doing business in the state. The Court reasoned that the corporation's presence, through its agents, constituted implied consent to be sued there in accordance with the state's statute. *See also Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917) (holding that out-of-state corporation's in-state business may be so extensive as to imply physical presence in state).

Because the articulation of the "presence in a state" necessary to personal jurisdiction over the person was too limited for the increasing demands of interstate commerce and an expanding economy, the Supreme Court eventually adopted a more flexible approach that recognized a state's jurisdictional power over a person not only when the person is present in the state, but also when the person conducts meaningful activity there even if not physically present. *See Hanson v. Denckla*, 357 U.S. 235, 251 (1958). This modern approach, which began in 1945, focuses on an out-of-state person's contacts with the forum state coupled with notions of fairness in asserting jurisdiction over that person. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222 (1957). Even though the Court in *International Shoe* recognized for the first time an expanded state power to exercise jurisdiction over a person not physically "present" there, its holding was rooted in finding a suitable analogy for the "presence" of the out-of-state party. *International Shoe* expressly relied on, and did not overrule *Pennoyer v. Neff*, noting that "the terms 'present' or 'presence' are used merely to *symbolize* those activities of the corporation's agent within the state which the courts will deem to be sufficient to satisfy the demands of due process." *International Shoe*, 326

U.S. at 316-317 (emphasis added). Establishing a theoretical structure on which to justify the minimum contacts doctrine, the Court stated,

> "Presence" in the state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.

Id. at 317. It also noted the obverse, pointing out that the "casual presence of a corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." *Id.* "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state." *Id. at* 319. Requiring a corporation to respond to litigation arising from those activities can "hardly be said to be undue" for purposes of the Due Process Clause. *Id.* Thus, notwithstanding the physical absence of a person from the territorial limits of the state, the defendant in *International Shoe* was subject to suit there.

International Shoe leaves us with a two-pronged requirement for asserting jurisdiction over a person not present in a state. The person must (1) have certain minimum contacts or ties with the forum state such that (2) maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.* at 316. Thus, while *International Shoe* expands upon the notion of "presence" to provide flexibility to accommodate the increased flow of commerce between the states, *see Hanson,* 357 U.S. at 251 (1958), the standard for imposing jurisdiction over persons outside the state has remained one that depends on a measure of the person's activity *in the state* coupled with the constraint that the state's exercise of such power would not offend traditional notions of fair play.

In the years since *International Shoe,* the Court has further refined the definition of "minimum contacts." In *Hanson,* the Court limited those "minimum contacts" necessary to confer jurisdiction to those activities of an out-of-state person by which

the person "purposely avails itself of the privilege of conducting activities within the forum state." 357 U.S. at 253. This occurs where the contacts "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state," *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985) (quoting *McGee,* 355 U.S. at 223) (emphasis in original), or where the defendant's efforts are "purposefully directed" at the state. *Id.* at 476. This test is not to be applied mechanically; it "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *International Shoe,* 326 U.S. at 319.

These modern principles of personal jurisdiction do not, and indeed under the Constitution could not, reorder the separate sovereignties of the states. A state's jurisdictional power remains territorial, to be exercised within its boundaries over persons, property and *activities* there. Rather, these principles focus on the nature and quality of contacts with the state to determine whether they justify the state's exercise of its judicial power over the person.

Two relatively recent Supreme Court cases, without overruling the foregoing principles, have addressed personal jurisdiction issues in the products liability context with additional language that has reopened the discussion of long-arm jurisdiction's reach. In *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980), a married couple who, after having purchased a new Audi automobile from a dealer in New York, were on their way to their new residence in Arizona, were involved in an accident in Oklahoma, resulting in severe injuries to the wife and the couple's two children. The couple brought suit in Oklahoma against the New York dealer and the New York distributor, claiming that design defects in the automobile contributed to the plaintiffs' injuries. While the plaintiffs acknowledged that the two New York corporations were present and did business only in New York, they argued that Oklahoma's exercise of jurisdiction over the New York corporations was appropriate because of the mobile nature of the automobile and the foreseeability that some cars these corporations sold would find their way into Oklahoma. The Supreme Court, however,

rejected the argument, ruling that the exercise of personal jurisdiction over the New York corporations by an Oklahoma court would violate the Fourteenth Amendment. It reached this conclusion because the New York corporations directed no activity to Oklahoma. As the Court said,

> [they] avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market.

444 U.S. at 295. While this reasoning, focusing upon the defendants' actual contacts with Oklahoma, is consistent with the Court's earlier jurisprudence, the Court elsewhere discussed the type of foreseeability which is critical as an element of minimum contacts. Rejecting the notion that foreseeability based on a "mere likelihood" that a product would find its way to the forum state could establish jurisdiction, the Court stated instead that the person should "reasonably anticipate being haled into court there." *Id.* at 297. The Court then stated:

> The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-98.

Notwithstanding the breadth of this "stream of commerce" language, the entire opinion indicates that the Court has not abandoned the notion that jurisdiction must rest on a person's activity *deliberately directed* toward the forum state. The Court acknowledged that defendants must be allowed "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." 444 U.S. at 297. Echoing the same theme, the Court noted that "[w]hen a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' *Hanson*, 357

U.S. at 253, *it has clear notice that it is subject to suit there,* and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the state." *Id.* (emphasis added).

In sum, the *World-Wide Volkswagen* Court's repeated reliance upon the fact that defendants, who did not direct any of their activities toward Oklahoma, could not have anticipated being subject to the jurisdiction of Oklahoma courts, leads us to believe that we should not read the "stream of commerce" language out of context. While *World-Wide Volkswagen* has been cited for the proposition that personal jurisdiction may follow a product if it is delivered "into the stream of commerce with the expectation that [it] will be purchased by consumers in the forum state," *see, e.g., Bean Dredging Corp. v. Dredge Technology Corp.,* 744 F.2d 1081 (5th Cir. 1984), *Nelson v. Park Industries, Inc.,* 717 F.2d 1120 (7th Cir. 1983), *cert. denied,* 465 U.S. 1024 (1984), we read the holding of the case to be much narrower, requiring purposeful activity on the part of the defendants to establish a meaningful contact with the forum state.

In *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102 (1987), the Court attempted to throw additional light on *World-Wide Volkswagen's* language that a mere placement of goods "in the stream of commerce" subjects a plaintiff to suit in any state where the goods might foreseeably cause injury, but its efforts were inconclusive. In *Asahi,* a Californian who was injured in a motorcycle accident when his rear tire tube exploded filed suit against a Taiwanese manufacturer of the tube, which in turn impleaded Asahi, a Japanese company which manufactured and supplied the tube's valve assembly. Although Asahi acknowledged that it was aware that its valve assemblies would eventually be sold on motorcycles throughout the United States, it asserted that it never expected to be subject to suit in the United States, since all of its sales flowed from Japan to Taiwan. Relying on the second prong of *International Shoe,* a unanimous Supreme Court concluded that California's assertion of jurisdiction over Asahi would be unconstitutional. It held that the assertion of such jurisdiction would

"offend traditional notions of fair play and substantial justice," taking into account the burden on Asahi to defend an American suit and California's minor interest in deciding whether Asahi would have to indemnity the Taiwanese manufacturer. *Id.* at 114. The Court also noted that the "unique burdens placed upon one who must defend oneself in a foreign legal system" counsel strongly in favor of finding no jurisdiction. *Id.* at 114, 115.

Addressing the question of whether Asahi maintained "minimum contacts" with California sufficient to satisfy the first prong of *International Shoe,* the Court produced three opinions, none of which mustered majority support. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia, recognized that the language of *World-Wide Volkswagen* might be read to allow jurisdiction over *any* manufacturer which is aware that its product may be sold in the forum state. She noted, however, that some courts had rejected so broad an interpretation of *World-Wide Volkswagen,* reading it to require more of the defendant than mere knowledge of the product's entry into the forum state through the stream of commerce. She sided with those courts:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

480 U.S. at 112 (O'Connor, J.). Thus, even though Asahi may have been aware that its products would be sold in California, its

lack of conduct directed specifically at California made jurisdiction in California improper under a "minimum contacts" analysis.

Justice Brennan, joined by Justices White, Marshall and Blackmun, concluded that *World-Wide Volkswagen* should not be read to require "additional conduct" beyond simply placing a product in the stream of commerce with the expectation that it will be purchased in the forum state. As Justice Brennan continued, "As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117 (Brennan, J.).

Justice Stevens, the swing vote, joined Justice O'Connor's opinion except with regard to the minimum contacts issue. He refused to join that aspect of the case because it was not necessary to the decision of the Court in view of its reliance on the second prong of *International Shoe*. In addition, "even assuming that the test ought to be formulated here," Justice Stevens concluded that Justice O'Connor's opinion "misapplies [the test] to the facts of this case." *Id.* at 122 (Stevens, J.). He concluded that Asahi's conduct did rise to the level of "purposeful availment" in the state of California because of the large number of Asahi's units that ended up there. *Id.*

Our reading of *World-Wide Volkswagen* and *Asahi* is that the Supreme Court has not abandoned the *International Shoe* two-pronged test as further articulated in *Hanson* and *Burger King*. The touchstone of the minimum contacts analysis remains that an out-of-state person have engaged in some activity purposefully directed toward the forum state. *See Hanson*, 357 U.S. at 253; *Burger King*, 471 U.S. at 475; *World-Wide Volkswagen*, 444 U.S. at 297. And if that initial test is met, a court must still determine whether the exercise of such jurisdiction would offend traditional notions of fair play and substantial justice. See *Asahi*, 480 U.S. at 113. This reading of *World-Wide Volkswagen* and *Asahi* has prior support in our jurisprudence. *See Ellicott Mach. Corp. v. John Holland Party, Ltd*, 995 F.2d 474, 477 (4th Cir. 1993) (holding that minimum contacts exist where the defendant "purposefully directs its activities toward the residents of the forum"); *see also Federal Insurance Co. v.*

Lake Shore, Inc., 886 F.2d 654 (4th Cir. 1989).[1] To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism. Such a rule would subject defendants to judgment in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and risks. Moreover, we do not believe that the holding of *World-Wide Volkswagen* takes us as far as plaintiff in this case suggests. Thus, we hold that the test to be applied in considering the reach of personal jurisdiction inquires whether (1) the defendant has created a substantial connection to the forum state by action purposefully directed toward the forum state or otherwise invoking the benefits and protections of the laws of the state; and (2) the exercise of jurisdiction based on those minimum contacts would not offend traditional notions of fair play and substantial justice, taking into account such factors as (a) the burden on the defendant, (b) the interests of the forum state, (c) the plaintiff's interest in obtaining relief, (d) the efficient resolution of controversies as between states, and (e) the shared interests of the several states in furthering fundamental substantive social policies. *See Hanson*, 357 U.S. at 253; *Burger King*, 471 U.S. at 475; *Asahi*, 480 U.S. at 113.

With this test now at hand, we turn to the facts of this case to determine whether Maryland can constitutionally assert personal jurisdiction over Hollingsworth & Vose.

---

1. Other circuits have split on the question of whether the "stream of commerce" language in *World-Wide Volkswagen* should control. *See Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992) (adopting Justice O'Connor's position); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990) (same); *Dehmlow v. Austin Fireworks*, 963 F.2d 941 (7th Cir. 1992) (adopting Justice Brennan's position); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir.) (same), *cert. denied*, 493 U.S. 823 (1989).

III

Hollingsworth & Vose is a Massachusetts corporation with its principal place of business in Massachusetts. It has demonstrated that it had no presence in Maryland by having any office, agent, or employee there, and it had no customers in Maryland. It was not registered to do business there and directed no marketing effort or other activities toward the state. It acknowledges, however, that less than one percent of its income has derived from Maryland through Lorillard's sale of cigarettes there. Hollingsworth & Vose entered into a filter supply arrangement with Lorillard under which Hollingsworth & Vose shipped filter material to Lorillard's plants in Kentucky and New Jersey. It acknowledges that, to the extent that it sold filter material to Lorillard in Kentucky and New Jersey, it placed the product in commerce, and it did so with knowledge that Kent cigarettes manufactured with its filter material would be sold in Maryland.

Lesnick relies principally upon the language in *World-Wide Volkswagen* that a state does not violate the Due Process Clause if it asserts personal jurisdiction over a corporation "that delivers its products into the stream of commerce with the expectation that they will be purchased in the forum State." 444 U.S. at 298. Hollingsworth & Vose concedes that if this language fully states the jurisdictional test, it is subject to personal jurisdiction in Maryland. As we have already concluded, however, *World-Wide Volkswagen's* holding is not so broad as Lesnick would have us believe, and the long-standing principles of personal jurisdiction that began with International Shoe have not been overruled. Thus, Lesnick cannot rely simply upon the "stream of commerce" logic to establish jurisdiction.

Lesnick falls back on the contention that because Hollingsworth & Vose had such a close relationship with Lorillard, Hollingsworth & Vose would be subject to jurisdiction derivatively through Lorillard's contacts. In support of her contention, Lesnick relies upon the close cooperation that existed between the two defendants by reason of the contract entered into in 1952. Under that agreement, the two jointly owned the patent to the "Micronite Filter" and agreed to share information about

technical advances in the field. The two also shared equally the costs of developing the filter, including the costs of creating manufacturing facilities, and they agreed to share any royalties they might earn from licensing the process. In addition, the price Lorillard paid for the filters was a multiple of Hollingsworth & Vose's cost, with Lorillard given a right to inspect production and financial records. Hollingsworth & Vose agreed to sell filter material for tobacco use only to Lorillard for at least the first five years of their dealings. Finally, Lorillard agreed to indemnify Hollingsworth & Vose for any liabilities arising from the harmful effects of the product. The record shows that the two companies exercised some measure of cooperation during the course of the agreement to ensure that the filter was successful.

Although this arrangement represents "additional conduct" beyond the mere sale to Lorillard of filter material,[2] it does not rise to the level of establishing jurisdiction because none of the conduct is in any way directed *toward the state of Maryland.* All of the listed contacts between Lorillard and Hollingsworth & Vose relate only to Hollingsworth & Vose's agreement to supply filters from its plant in Massachusetts to Lorillard in Kentucky and New Jersey. While the result might be different if Hollingsworth & Vose had changed production to comply with Maryland regulations or if it had set up a customer relations network there, *see Asahi,* 480 U.S. at 112 (O'Connor, J.), on the record in this case, we can discover no affirmative action by Hollingsworth & Vose rising to the level of purposeful availment. Therefore, the Maryland courts may not exercise personal jurisdiction over Hollingsworth & Vose in this case, and the judgment of the district court is affirmed.

AFFIRMED

---

2. Lesnick does not contend that Lorillard and Hollingsworth & Vose engaged in a joint venture as defined by Maryland law. We understand, rather, that her allegation rests on the notion that the closeness of the corporations' activities created a *de facto* agency for jurisdictional purposes.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 18, 1994

No. 93-1820
CA-91-3427

BEVERLY LESNICK, Individually and as Personal Representative of the Estate of Stanley S. Lesnick
Plaintiff-Appellant

v.

HOLLINGSWORTH & VOSE, CO.
Defendant-Appellee

and

LORILLARD, INC.
Defendant

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BEVERLY LESNICK, ET AL.	*	
v.	*	CIVIL NO. K-91-3427
LORILLARD, INC.	*	
and	*	
HOLLINGSWORTH & VOSE COMPANY		**MEMORANDUM AND ORDER**

For the reasons stated on January 5, 1993, by this Court during an on-the-record proceeding in chambers with counsel for all parties present, and in memoranda filed by defendant Hollingsworth & Vose Company before and after January 5, 1993, the motion of defendant Hollingsworth & Vose Company for dismissal for want of personal jurisdiction is hereby GRANTED. While the issue under the present state of the case law is a very close one, the said defendant is not in this Court's view a joint venturer of the defendant Lorillard, Inc. Rather, defendant Hollingsworth & Vose Company is an important, major, and perhaps even vital supplier of Lorillard. Still, Hollingsworth & Vose Company is not engaged directly, as is Lorillard, in bringing the alleged offending product into Maryland, or doing anything with respect to Maryland, other than supplying its product to defendant Lorillard in a state other than Maryland. Accordingly, in a separate Order of even date herewith, this Court will grant defendant Hollingsworth & Vose Company's motion under Federal Civil Rule 12(b)(2) and will enter judgment for defendant Hollingsworth & Vose Company, without prejudice.

The presently outstanding schedule in this case will continue in full force and effect as to plaintiff and defendant Lorillard, Inc.

Copies of this Memorandum and Order and of the said separate Order are today being mailed to counsel of record.

It is so ORDERED, this 13th day of April, 1993.

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BEVERLY LESNICK, Personal Representative of the Estate of Stanley S. Lesnick, Plaintiff,	*	Civil Action No. K-91-3427
v.	*	
LORILLARD, INC. and HOLLINGSWORTH & VOSE, Defendants.	*	101 W. Lombard Street Baltimore, MD 21201 January 5, 1993

TRANSCRIPT OF IN-CHAMBERS CONFERENCE BEFORE THE HONORABLE FRANK A. KAUFMAN UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:	HOWELL K. ROSENBERG, ESQUIRE MARC SELDIN ROSEN, ESQUIRE
For Lorillard, Inc.:	JAMES E. GRAY, ESQUIRE WILLIAMS S. OHLEMEYER, ESQUIRE
For Hollingsworth & Vose:	ANDREW J. McELANEY, JR., ESQ. STEPHEN J. BRAKE, ESQUIRE S. ELIZABETH EVANS, ESQUIRE
Transcription Service:	MONIQUE E. GIBSON M.E.G. TYPING & TRANSCRIPTION

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

plaintiff.

THE COURT: All right. The motion of Hollingsworth — and I'll refer to Hollingsworth and Vose just as Hollingsworth for shortcut reference purposes. This is, as I've said, a motion to dismiss the amended complaint for lack of personal jurisdiction. I would point out that the burden when such a motion is made under the case law indicates the following — just a moment.

(Brief pause.)

THE COURT: I refer you to *Reliance Field Products v. Watson,* W-A-T-S-O-N, et cetera, a Third Circuit 1982 case. 675 F.2d 587, particularly at 588, where Judge Gibbons, G-I-B-B-O-N-S, said that, of course, there are two steps to be undertaken. The initial one is whether the cause of action arises from the defendant's forum related activities or from non-forum related activities. And if the claim arises from forum related activities, whether there are no contacts, and if it is from non-forum activities whether there are in that context, sufficient contacts. When a defendant challenges personal jurisdiction, the burden is on the plaintiff to make a prima facia showing that jurisdiction exists.

The plaintiff can't simply rest on bare allegations in its complaint, rather it is obligated to come forward with sufficient proffers backed by appropriate documents. And I cite you, among other cases, to the Ninth Circuit opinion in *AMBA*, A-M-B-A, *Marketing Systems, Inc.* in 551 F.2d 787, 1977. There's a Third Circuit opinion in a case entitled *Comphaine*, C-O-M-P-H-A-I-N-E *Des*, D-E-S, *Vauxipes*, V-A-U-X-I-P-E-S, in 651 F.2d 881, 1981. And also there's an Eleventh Circuit Case, *Madira*, M-A-D-I-R-A, 916 F.2d 1510, in 1990, where the Eleventh Circuit said that prima facia case established that "the plaintiff presents enough evidence to withstand a motion for directed verdict. The district court must accept the factual elements in the complainant's proof to the extent they are uncontroverted by the defendant's affidavits with the light and all reasonable inferences in favor of the plaintiff."

Against that background, let's take a look at what appear to be the uncontroverted facts or, if not the uncontroverted facts, the facts that run most favorably in the defendant's point of view.

Hollingsworth is a Massachusetts' corporation with its principal place of business in Massachusetts. By the way, I note that there are affidavits and other materials besides the pleadings which were filed in this case so that even though this is a personal jurisdiction motion, this Court must, in effect, for purposes of the summary judgment make a motion with the inferences going in favor of the plaintiff and against the maker of the motion.

The plaintiff's cause of action arises out of allegedly negligent conduct of Hollingsworth or at least of a former subsidiary of Hollingsworth, that former sole subsidiary is named H & V – H for Harry, the & sign, the ampersand sign, V for Victor – Specialties Co., Inc. During the years from 1952 to '56, Specialties manufactured asbestos contained filter media which was sold to Lorillard for use by Lorillard in the manufacture of micronite, M-I-C-R-O-N-I-T-E, filters for Kent cigarettes. The filter media – I made a mistake there – the filter media was actually manufactured by Specialties of Massachusetts and then shipped by Specialties from Massachusetts to Lorillard's factory in two places, Louisville, Kentucky and Jersey City, New Jersey. In May of '56, Specialties ceased its production of the filter media. The plaintiff's claim arises out of the alleged use of Kent cigarettes during the 1950s in Maryland.

Now, at the time this case was brought and as of today, as I understand it, H & V, that's Hollingsworth and Vose, Hollingsworth in other words, manufactured scientific and technical papers which were sold nationwide. It doesn't have any ongoing presence in Maryland and it didn't when this case was decided, nor any other significant contacts in Maryland.

The question arises, therefore, whether H & V, either through what Specialties, its subsidiary, back in the years gone by did by way of – well, let's go back again a moment. Whether Hollingsworth's subsidiary, back in the 1950s, had sufficient contacts with Maryland so that Maryland's long-arm jurisdiction can apply, constitutionally and statutorily, and whether – or, not and whether – or whether a Hollingsworth sale of paper products today establishes those kind of contacts. The plaintiff says yes, and defendant Hollingsworth says no.

Now, I'm not going to stop very long on the facts. It's a two-part test whether the Maryland long-arm statute applies, and if so whether the federal constitutional standards are met, at a minimum. Under Maryland law, or under case law there is the Maryland long-arm statute provisions which were are going to deal with today, have been held by the Court of Appeals of Maryland to extend to their full constitutional breadth, B-R-E-A-D-T-H. There's some leading cases, of course, that we will refer to.

We go back to the linchpin case of *International Shoe*, 326 U.S. 310, 1945, which has come forward to any number of cases but I think it will suffice for the purpose of this proceeding and the present issues before the Court to be guided by the following case of *Worldwide Volkswagen*, at 444 U.S., *Helicopteros*, H-E-L-I-C-O-P-T-E-R-O-S, in 466 U.S., *Burger King*, in 471 U.S., and *Ashi*, A-S-H-I, *Metal*, in 480 U. S.

Now, another way of putting the distinction between forum contacts and other non-forum contacts if you talk in terms of what is called specific jurisdiction on the one hand and general jurisdiction on the other hand. I think that the leading cases that I just referred to, particularly *Helicopteros*, take us down that line. Counsel has cited any number of cases including opinions of this Court which apply to those principles. Where a cause of action arises out of defendant's contacts with the forum state, a court may assert specific jurisdiction.

Now, let's take a look at specific jurisdiction for a moment before we go beyond this, to general jurisdiction. In specific jurisdiction we're looking for a contact with the forum state. Now, first, let's look at the filter media. The filter media was manufactured within Massachusetts. The filter media was not sent by H & V to Lorillard in Maryland. It was sent to New Jersey. It was sent to Kentucky. It was sent by Specialties, and unless someone indicates something to the contrary I would view Specialties just as I would view Hollingsworth.

And Specialties did not advertise in Maryland. It didn't design the product specifically for the Maryland market. On the other hand, it didn't design the product apparently specifically for any particular state or local market — the entire nationwide market and the United States and/or beyond. Specialties did not

maintain an office in Maryland. Specialties wasn't licensed to do business in Maryland. Specialties didn't employ a sales agent or a distributor in Maryland.

But by selling filter media to Lorillard with the knowledge that Lorillard would sell Kent cigarettes throughout the United States, including in Maryland, it is clear that Specialties did cause its products to come into the stream of commerce and in to Maryland. The question is whether that's enough. For reasons that I will return to more detail, I believe that the case law culminating in *Ashi* is to the contrary.

Doing what Specialties did isn't an act purposely directed toward Maryland, even though Specialties knew Lorillard was selling cigarettes in Maryland. On that basis I think that the plaintiff can't prevail on the special jurisdiction. On general jurisdiction, there has to be a showing that the contacts directed toward Maryland were of a continuous and of a systematic nature and fairly extensive. And that's required in order to avoid a pending motion for fair play and substantial justice.

General advertising in trade journals, even if some of them had circulation in Maryland, isn't enough even where there's some sales through wholesalers and dealers in Maryland. And I (inaudible) Hollingsworth has no business presence in Maryland. I'm repeating now – no employees in Maryland. No office in Maryland. Was not licensed to do business in Maryland. Did no direct advertising in Maryland. Didn't design a product specifically for marketing in Maryland. Maintained no bank accounts in Maryland. No telephone listings. Derived an insubstantial portion of its revenue from the sales of the Kent cigarettes in Maryland.

It did advertise in nationally distributed publications, that is Hollingsworth did. Its product did end up in Maryland. It just had minimal contact, not sufficient under the case law that I referred to which I'll analyze in more detail with you in a few minutes.

Now, I recognize that this is a case brought individually and there's a personal representative of the estate of the plaintiff's deceased husband, and this Court accepts these allegations of fact as facts for purposes of determining this motion. Namely, that the deceased husband died after contracting mesothelioma,

M-E-S-O-T-H-E-L-I-O-M-A, which is an incurable form of cancer, caused by inhalation of asbestos particles. It's alleged that those particles caused Mr. Lesnick's death. It's alleged they were hidden in the filters of Kent cigarettes from 1952 to '56. That Hollingsworth and Lorillard, Inc., who is the other defendant in this case, or which is the other defendant in this case, were jointly assigned a patent for the filter media, the method of making the filters, and the apparatus for making filters. And their filter media was manufactured in a joint venture by Hollingsworth and Lorillard. They were the active participation and knowledge of H & V. It goes back to the participation and knowledge of Hollingsworth. Their filters were promoted nationally, distributed and sold throughout the United States including Maryland.

The plaintiff says that it recognizes all of the lack of contacts with Maryland, that there's no factory in Maryland, no registration to do business in Maryland. Even that there was no toll free number in Maryland. No employees kept in Maryland by Hollingsworth.

I think the plaintiff has every right to emphasize that the filters were specifically designed for sale to consumers throughout the United States including Maryland. And that for purposes of this motion, this Court must assume that by the time Hollingsworth removed the asbestos in 1956, more than 10 billion cigarettes had been distributed to consumers. That the Decedent Lesnick smoked the possibility of 30 asbestos-laden cigarettes per day in 1952 to '56, that he purchased and smoked a large number of Kent cigarettes and that he did it in Maryland, and that he died because the asbestos escaped through more than 43,000 of the filters into his lungs.

The agreement of February 14, 1952 between Hollingsworth and Lorillard, which is part of the record, shows that Hollingsworth held itself out as having acquired special knowledge and technique relating to the construction and manufacture of filtering materials comprising mineral products. The patent is jointly, as I said before, owned by Hollingsworth and Lorillard. The two of them mutually contracted to exploit the joint ownership of the process of the invention. They agreed to, and apparently for purposes of this motion, they figured they did

share a chain of technological improvements applicable to the packaging, emphasized their best efforts to inspire (inaudible) to distribute, and to disclose back and forth among to distribute to customers and also to disclose among the two of them everything they learned about inventions and improvements in this entire process. Costs to the inventor were equally apparently borne by the two, that is by Hollingsworth and Lorillard. They have an extensive detailed agreement with regard to having this relationship with these filters come out of Massachusetts from Hollingsworth, go to Lorillard, and be put into the manufacture of the Kent cigarettes, distributed to the fullest extent possible including in Maryland by Lorillard.

I think the plaintiff is on sound ground saying the relationship between Hollingsworth and Lorillard was not that of a raw material supplier and a purchase. Hollingsworth was compensated based on volume and was very much interested in the promotion of these sales. And the parties did jointly meet and do everything they could to work together to develop, manufacture, and sell. And Hollingsworth kept up to date on what was going on in terms of the way Lorillard was marketing and handling the Kent cigarettes. Just as apparently, Lorillard kept up on everything Hollingsworth was doing in Massachusetts in terms of the shipping to Louisville and New Jersey. There were joint press releases and so forth.

The fact remains, however, that what Hollingsworth thought of the activities was not performed by Hollingsworth in Maryland. And that Hollingsworth's contacts with Maryland were only through what Lorillard did. And Lorillard did that as Lorillard even though it did it growing out of the joint venture and the joint agreement. It still did it as Lorillard. That doesn't mean that the part played by Hollingsworth wasn't disclosed or wasn't known. Nevertheless, it was done by Lorillard.

Plaintiffs point out that Hollingsworth people visited Lorillard's facilities to keep up to date and do evaluations and worked jointly. And that Lorillard in its advertisements told of the part that was being played by Hollingsworth. From 1954, the plaintiffs say that the defendants determined, that is Hollingsworth and Lorillard, had removed the asbestos and portions of (inaudible). And that the asbestos placed in the filters by the

two defendants remained in the cigarettes up until 1956 anyway. Hollingsworth tries to say there wasn't a distant seller of a raw material which was later refined by Lorillard and incorporated into a product with which it had no familiarity. And obviously that's stated with an eye to *Ashi* (inaudible).

At one point in their written presentation, plaintiffs try to say or do say that Maryland had a manifest interest in providing a forum for addressing the wrongs committed by Hollingsworth, but no more strong than California had in their *Ashi* case. If a part of an automobile has malfunctioned and it's the fault of a manufacturer for which its distributor is dealing — and that distributor puts that product out on the market in California, California is certainly concerned. The question is whether there is sufficient contact.

What this Court's view of this motion adds up to is that this battle that plaintiff is making in this case has already been lost on the defendant's case law. And this Court as a federal district court is obliged to apply the law in this way. This argument that's made with regard to the multi-district panel announced by plaintiff does not seem to me to hold weight. The fact that the panel separated this kind of a case from the asbestos litigation docket and remanded the case to Maryland as the transferor court doesn't mean that the multi-district panel decided or indeed would have the jurisdiction to decide that Maryland would have jurisdiction, personal jurisdiction over Hollingsworth. The plaintiff chose this court as forum. The multi-district panel decided not to take the case and caused this court or any court to go outside of Maryland (inaudible) for purposes under the multi-district litigation approach. It doesn't affect the fact that the plaintiff has the burden to show the plaintiff has a right to be here in terms of personal jurisdiction.

It is true that the concurring opinions and the separate concurrences in *Ashi* do contain certain indications by those justices of how they viewed the majority opinion in the case. Some of those opinions were turning opinions and some were not. (inaudible). But what this Court must look to basically is from the various opinions.

(Brief pause.)

THE COURT: In Hollingsworth's reply memo, Hollingsworth takes the position that what the plaintiffs are really doing is trying to say that Lorillard was the agent of Specialties and/or of Hollingsworth. Therefore, what it did was something that Lorillard did as agent. It's something that could be attributed to Hollingsworth. I think the analysis of the Hollingsworth writing in objecting to that is kind of a mixed fact of law.

Now, in a letter of November 11, 1992, Mr. Rosen, on behalf of the plaintiff, said that what Hollingsworth did in its reply memo filed October 30, 1992, was to take the position that Specialties is the proper party defendant rather than Hollingsworth. Let me ask someone speaking now on behalf of Hollingsworth, were you doing that?

MR. MCELANEY: No. Your Honor. (Inaudible).

THE COURT: I don't think I read that, and if that were done. I probably wouldn't permit it, or if it were done, I would say it didn't matter because it seems to me on this basis and in this case that plaintiff has shown enough connection between Hollingsworth and Specialties, so they ought to be treated as one in the same. Is Hollingsworth taking any different position?

MR. MCELANEY: Your Honor, Andrew McElaney, for Hollingsworth and Vose. Hollingsworth is the successor by merger to Specialties.

THE COURT: So. you're settled with everything that Specialties satisfied with? Is that correct?

MR. MCELANEY: That's perhaps a little broader than I would state it, but the answer is yes.

THE COURT: I'm sure that you would be more comfortable stating it more narrowly, but isn't what I said enough? Isn't what I said true and correct?

MR. MCELANEY: Respectfully, with respect to liabilities especially, that's true, Your Honor.

THE COURT: Certainly, for purposes of this motion, that's true?

MR. MCELANEY: Absolutely, you're correct.

THE COURT: Now, the latest case of *Ashi* is just a case that's too tough in this Court's opinion for the plaintiff to get over. Justice Brennan's dissent in *Ashi*, in this Court's view, and its rejection in the position stated in it, which was rejected by

the majority, is what, in this Court's judgment, puts the plaintiff behind the eight ball in this case, and behind the eight ball in such a way that they can't recover from it. And I think what Justice Brennan concluded was that in that case, *Ashi* was aware of the entire operation of the distribution system with regard to his valve assembly. He knew what was going on in California. He didn't design or control the system, but knew all about it, and was aware of it. He benefited economically from it, knew he would benefit economically from it, and worked in close tandem with those that were between it as the producer and shipper on the one hand, and to those who were on the firing line in California putting the product right into the market. The same thing occurred in this case.

Many of us who grew up in a period when *International Shoe* and its progeny were treated in a more expansive way than they are treated today, might well, writing on a clean slate, join Justice Brennan. But this is a federal district court, ladies and gentlemen, and this Court sitting is to interpret the law as it has been decided by the Supreme Court of the United States. I note a number of cases cited by the plaintiff that are Fourth Circuit cases, but many of those cases precede not only *Ashi* but some of these other cases. This is not the only case that reach agreement with this kind that I have in this court and/or other courts.

And I may be wrong, but I really don't think that this case is very close in view with *Ashi*, particularly even when the cases preceded *Ashi*. In *Ashi*, a Japanese company manufactured tire valve assemblies in Japan, sold them to several car manufacturers, including a company in Taiwan, T-A-I-W-A-N. And those were big sales that came out of this Taiwanese company alone. And it incorporated. What it did was the assemblies it made in Taiwan, that is being the Taiwanese company, and the finished tires, which was sold throughout the world including the United States. And 20 percent of its sales in the United States took place in California. And all that was going on between '78 and '82. And in '78, in California, a driver of a motorcycle lost control of his vehicle and collided with a tractor and was killed – was severely injured and his wife, who was a passenger, was killed. He filed a product liability case in a California state court against the

Taiwanese company, and alleged inter alia, I-N-T-E-R A-L-I-A, the second word, that the accident was caused by a sudden loss of air and an infringement of the rear tire of the motorcycle. And the motorcycle tire, tube, and sealant, S-E-A-L-A-N-T, were defective. The Taiwanese company filed a cross claim seeking indemnification from the Japanese Company. The motorcycle driver settled with the Taiwanese company and the other defendants and left alive only the Taiwanese indemnity action against the Japanese company. The Japanese company claimed lack of personal jurisdiction. The Japanese company, according to the record, was fully aware that tire valve assemblies which it sold to the Taiwanese company would end up throughout the United States and California. The California state court denied the motion. The Court of Appeals in California in the appellate court reversed. And then the Supreme Court of California went back along with the trial court and said that there was personal jurisdiction. And then the Supreme Court of the United States reversed and remanded.

Justice O'Connor wrote the majority opinion and concluded that even if we assume that the Japanese company was aware that some of the valves sold to the Taiwanese company would be incorporated into cars sold in California, the Japanese company didn't take any action to — sufficient action to purposely avail itself of the California market. And that minimum contact between the Japanese company and California were not present.

That can, of course, be factually distinguished to the facts of this case. The question is whether those distinctions and differences are sufficient and have any material effect in this case. I don't think they are. She spends more time going back into the detailed facts of the *Helicopteros* and *Worldwide Volkswagen,* and even more so perhaps in the *Burger King.* And I don't think there's much that you can do with anything that's said or written in those cases, no matter how more often than frequently you pour over them. I lost track of my sentence structure. I don't think there's much more that can be said which is relevant or material than I haven't said.

Before I give plaintiff a chance to show me the errors of my way and finalize it, if I do, I'm going to give you, a response to that motion as set forth, Hollingsworth's counsel, is there anything else?

Supreme Court, U.S.
FILED
JAN 19 1995
CLERK

(2)

No. 94-1085

IN THE

Supreme Court of the United States

October Term, 1994

BEVERLY LESNICK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY S. LESNICK,
Petitioner,

v.

HOLLINGSWORTH & VOSE COMPANY,
Defendant-Respondent.

and

LORILLARD, INC.,
Defendant.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

*ALAN D. ROSE
ANDREW J. MCELANEY, Jr.
STEPHEN J. BRAKE
NUTTER, MCCLENNEN & FISH
One International Place
Boston, Massachusetts 02110-2699
(617) 439-2000
Attorneys for Respondent

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

22 pp

QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's dismissal of Hollingsworth & Vose Company for lack of personal jurisdiction where 1) Hollingsworth & Vose was a supplier to Lorillard of bulk filter material as a component part of a product, and 2) the end product (Kent cigarettes) entered the forum state solely as the result of the actions of Lorillard?

RULE 29.1 LIST

Hollingsworth & Vose Company's non-wholly owned subsidiary corporations are Neponset River Company and Hovomex, S.A. Hollingsworth & Vose Company does not have a parent corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.1 LIST ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE WRIT 4

I. PETITIONER'S CONTENTION THAT THE FOURTH CIRCUIT'S OPINION IS IN CONFLICT WITH PRIOR DECISIONS OF THE SIXTH OR ELEVENTH CIRCUITS IS INCORRECT. 4

II. THE FOURTH CIRCUIT CORRECTLY APPLIED THE STANDARD GOVERNING THE EXERCISE OF PERSONAL JURISDICTION UNDER THE DUE PROCESS CLAUSE. 7

CONCLUSION 12

APPENDIX *follows conclusion*

TABLE OF AUTHORITIES

Asahi Metal Indus. Co. v. *Superior Court*, 480 U.S. 102 (1987) 7, 9, 11

Burger King Corp. v. *Rudzewicz*, 471 U.S. 462 (1985) 8

Hanson v. *Denckla*, 357 U.S. 235 (1958) 8

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 3, 8, 11

McGee v. *International Life Ins. Co.*, 355 U.S. 220 (1957) 8

Tobin v. *Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993) 4, 5

Vermeulen v. *Renault U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993) 4, 6, 6n, 7

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 7, 10, 11

STATUTES

United States Code

28 U.S.C. § 1605(a)(2) 6

No. 94-1085

IN THE

Supreme Court of the United States

October Term, 1994

BEVERLY LESNICK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY S. LESNICK,
Petitioner,

v.

HOLLINGSWORTH & VOSE COMPANY,
Defendant-Respondent.

and

LORILLARD, INC.,
Defendant.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Respondent, Hollingsworth & Vose Company ("H&V"), submits this brief in opposition to the petition for a writ of certiorari filed by Petitioner, Beverly Lesnick ("Lesnick").

STATEMENT OF THE CASE

Lesnick's Statement of the Case does not fairly set forth the case and the facts. H&V, therefore, submits the following statement of the relevant facts.

H&V is a corporation organized and existing under the laws of the Commonwealth of Massachusetts with its principal place of business in East Walpole, Massachusetts. Beginning in March 1952, H&V Specialties Co., Inc., a then-existing subsidiary of H&V ("Specialities"), manufactured an asbestos-containing filter media which was sold in bulk form to P. Lorillard Company, Inc. ("Lorillard"). The filter media was used by Lorillard in the manufacture of filters for its Kent cigarettes. Specialties manufactured the filter media in Massachusetts and shipped it to Lorillard's factories in Louisville, Kentucky and Jersey City, New Jersey. These were the only two locations to which the filter media was ever delivered. Specialties ceased production of the filter media in May 1956. Specialties was merged into H&V in 1957.

Specialties manufactured the filter media pursuant to a contract with Lorillard entered into on February 14, 1952 (the "Agreement"). The Agreement provided that, for a period of five years, Specialities would manufacture and sell filter media to Lorillard. Once the material was shipped to Lorillard, Specialties had no control over the re-use of the material or the ultimate manufacture, marketing, or sale of Lorillard's product.[1]

SUMMARY OF ARGUMENT

In her petition, Lesnick is seeking the adoption of two rules of law, each of which would fundamentally alter fifty years of

[1] The court of appeals refers to H&V and Specialities collectively as H&V throughout its opinion. Respondent, therefore, has done likewise in the body of this opposition.

"minimum contacts" due process analysis. First Lesnick argues, as she did in the courts below, that the contacts of Lorillard with Maryland, in marketing its cigarettes in that state, should be imputed to H&V for jurisdictional purposes. To accomplish this Lesnick seems to claim that Lorillard was in some sense H&V's agent (while nonetheless having agreed in the district court that there was no basis for a claim there was a joint venture between H&V and Lorillard). Lesnick seeks to assert jurisdiction over H&V through the marketing activities of a wholly unrelated entity, thereby ignoring the longstanding notion that the existence of personal jurisdiction depends upon the nature and quality of the relationship between the *defendant* itself, the forum and the litigation.

Second, Lesnick advances the notion that a plaintiff should always have the right to "fully vindicate his rights in the forum of his residence." Pet. 10.[2] Lesnick faults the court below for failing to apply this supposed rule. Again Lesnick has shifted the focus entirely away from the defendant's contacts with the forum state, to a generalized notion of fairness to, and convenience of, the plaintiff. Here too, Lesnick urges the Court to abandon the "minimum contacts" analysis first established in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

Lesnick's contention that the decision of the United States Court of Appeals for the Fourth Circuit is in conflict with prior decisions of the United States Courts of Appeals for the Sixth and Eleventh Circuits is in error. The cases upon which Lesnick relies held that where a foreign corporation establishes and controls a distribution network in the forum state it has met the minimum contacts test. Nothing in those cases would allow the assertion of jurisdiction over H&V here. Again Lesnick seeks to merge H&V and Lorillard — somehow granting to H&V the ability to control Lorillard's distribution of its cigarettes.

---

[2] The abbreviation "Pet." shall refer herein to the Petition for Writ of Certiorari. Likewise, the abbreviation "Pet. App." shall refer to the Appendix to the Petition for Writ of Certiorari.

The Fourth Circuit properly applied the standard fashioned by this Court for determining whether a state's exercise of jurisdiction over a non-resident defendant comports with due process. The Kent cigarettes that Lesnick alleges caused harm were sold by Lorillard in Maryland. H&V had no contacts with Maryland and engaged in no additional conduct purposefully directed toward the State of Maryland.

REASONS FOR DENYING THE WRIT

I. Petitioner's Contention That The Fourth Circuit's Opinion Is In Conflict With Prior Decisions Of The Sixth Or Eleventh Circuits Is Incorrect.

According to Lesnick, the Fourth Circuit's decision conflicts with prior decisions of the Sixth and Eleventh Circuits. Pet. 6. In fact, neither *Tobin* v. *Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993), nor *Vermeulen* v. *Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993), the cases relied upon by Lesnick, conflict with the opinion rendered by the Fourth Circuit. In both cases, the defendant had distinct contacts with the forum state, in particular, controlling the means of distribution of its product in that forum. *Tobin* v. *Astra Pharmaceutical Products, Inc.*, 993 F.2d at 544; *Vermeulen* v. *Renault, U.S.A., Inc.*, 985 F.2d at 1550. H&V did not in any sense control the means of distribution of Lorillard's product. Indeed, for these cases to be analogous to the case at bar, Lorillard, a cigarette manufacturer, has to be viewed as a distribution network for H&V's filter material.[3] This notion is obviously absurd and no conflict exists with these cases.

---

[3] Indeed, H&V did not manufacture "filters" but the bulk filter material from which Lorillard manufactured filters. Pet. App. 20a.

In *Tobin* v. *Astra Pharmaceutical Products, Inc.*, the plaintiff asserted jurisdiction over a foreign drug manufacturer named Duphar, in the federal district court of Kentucky. 993 F.2d at 542. The Sixth Circuit Court of Appeals found that Duphar had, through its own actions, purposefully availed itself of the privilege of doing business in Kentucky. *Id.*

The court relied on the following contacts between the defendant and Kentucky. First, Duphar, after modifying its product to conform to FDA standards, specifically licensed a distributor, acting as its sales agent, to market the product in all fifty states. *Id.* at 544. Duphar, therefore, controlled "the distribution system that brought [its product] to Kentucky." *Id.* The court further noted that Duphar also kept control over an essential element of the product, i.e. the package insert, by controlling the information given to the FDA as well as controlling any changes in the wording of the product's package insert. *Id.*

By focusing on the control Duphar exercised over the destination and distribution of its product, the Sixth Circuit properly found personal jurisdiction over Duphar in the forum state. This analysis does not conflict with the decision of the Fourth Circuit. Both courts held that before personal jurisdiction is proper over a defendant, there must be evidence that the defendant itself has engaged in conduct directed toward the forum state sufficient to satisfy the "minimum contacts" test of the due process clause. Duphar, as the product manufacturer, "made a *deliberate decision* to market [its product] in all 50 states, including Kentucky, the forum state." *Id.* at 543 (emphasis in original). H&V, on the other hand, had no control, either directly or indirectly, over where Lorillard's products would be sold. As both the district and circuit courts recognized, Lorillard, and only Lorillard, maintained control over the destination, distribution and sale of the final product. H&V, unlike Duphar, did not control the manner of distribution of the end product and there is no conflict between these decisions.

Lesnick also asserts that the Fourth Circuit's opinion conflicts with *Vermeulen* v. *Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993). In *Vermeulen*, the plaintiff sought personal jurisdiction over the defendant, Renault, in federal district court in Georgia. 985 F.2d at 1541. As Renault was a corporation wholly owned by the French government, the Eleventh Circuit, raised, *sua sponte*, the issue of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). *Id.* at 1542-43.

The FSIA mandates that to establish subject matter jurisdiction over a foreign state, that state must have engaged in some commercial activity that "caused a direct effect on the United States." 28 U.S.C. § 1605(a)(2). To determine whether Renault's commercial activities had a direct effect on the United States, the court looked to the minimum contacts test. *Vermeulen* v. *Renault*, 985 F.2d at 1545. Because under the FSIA the forum with which the defendant must have minimum contacts is the United States, the court did not need to find that Renault had any particular contact with Georgia, the forum state, but simply assessed its contacts with the United States as a whole. *Id.*

The court found sufficient contact between Renault and the United States to support federal *subject matter* jurisdiction under the FSIA. *Id.* at 1549. Renault designed its product for the American market; advertised and marketed its product in the United States; established channels for providing regular advice to customers in the United States; and, most importantly, created and controlled the distribution network that brought its product into the United States. *Id* at 1549-50.[4]

Renault's contacts with the United States had all of the indicia of purposeful availment of the privilege of conducting business

[4] *Vermeulen* is a case principally concerned with subject matter jurisdiction under the FSIA. 985 F.2d at 1553. The "minimum contacts" analysis arises in that context only and does not relate to whether the assertion of jurisdiction by a state court is consistent with due process.

in the United States by designing, marketing and advertising its product for and in the United States; establishing channels for advising customers in the United States; and creating and controlling the distribution network that brought its product into the United States. *Vermeulen* v. *Renault*, 985 F.2d at 1550. The nature, extent and quality of Renault's contacts with the United States — and in particular its control of the distribution network for its automobiles — render the case wholly distinguishable. H&V did not control the distribution of Lorillard's product, and these decisions are not in conflict.[5]

II. The Fourth Circuit Correctly Applied The Standard Governing The Exercise Of Personal Jurisdiction Under The Due Process Clause.

In determining that a Maryland court could not properly exercise personal jurisdiction over H&V, the Fourth Circuit applied the prevailing constitutional analysis. The Fourth Circuit carefully traced the historical development of the standard for long-arm jurisdiction as articulated by this Court and closely examined the implications of this Court's most recent opinions in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102 (1987).

[5] Initially in the district court, Lesnick claimed — withouth an evidentiary basis — that H&V and Lorillard were involved in a joint venture. The district court observed that this contention was "close to frivolity" and gave Lesnick the opportunity for further briefing. Respondent App. 3. Lesnick then expressly waived the notion that H&V and Lorillard were joint venturers and hence each other's agents for jurisdictional purposes. Pet. App. 15a. In the court of appeals, however, Lesnick attempted to re-raise the notion, calling it a "co-partnership" (a contention referred to as *de facto* agency). Pet. App. 15a. In any event, this contention amounts to an assertion that the jurisdictional analysis should be governed by Lorillard's and not H&V's contacts with Maryland. A contention properly rejected by both the district court and the court of appeals.

Although the standard for the exercise of personal jurisdiction pursuant to the due process clause has undergone progressive refinement since the time of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985). Satisfaction of the "minimum contacts" test requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

This Court has explained that jurisdiction is proper only where "the contacts result from actions by the defendant *himself* that create a 'substantial connection' to the forum state." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. at 475 (citing *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (emphasis in original)). As this Court has observed, the "unilateral activity of those who claim some relationship with the defendant cannot satisfy the requirement of contact with the forum state." *Hanson* v. *Denckla*, 357 U.S. at 253 (quoted in *Burger King*, 471 U.S. at 474-75). Hence, Lorillard's contacts with Maryland cannot properly prove to be the basis for establishing jurisdiction over H&V.

Lesnick seeks to avoid the application of this principle by implicitly raising the notion that Lorillard was somehow H&V's agent for selling filter material (and hence for establishing jurisdiction) in Maryland. Lesnick, for instance, speaks of "joint efforts" of H&V and Lorillard to bring Kent cigarettes to Maryland. Pet. 5. As both the district court found and the court of appeals upheld — taking all facts as alleged in the complaint as true — there is no factual basis to establish an agency or joint venture relationship. Pet. 15a. The fact remains that it is H&V's contacts with Maryland which must be viewed when determining if jurisdiction is proper, and H&V directed no conduct to Maryland.

In challenging the validity of the Fourth Circuit's decision, Lesnick also contends that the court found that H&V engaged in "additional conduct" beyond merely placing its filter media in the stream of commerce, but still found no personal jurisdiction over H&V. *Id.* Lesnick suggests, therefore, the Fourth Circuit misapplied the "additional conduct" test set forth in Justice O'Connor's plurality opinion in *Asahi*. Pet. 8. Here Lesnick is engaging in a semantic game. Justice O'Connor's *Asahi* opinion would require "an action of the defendant purposefully *directed* toward the forum state." *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. at 112 (emphasis added). The Fourth Circuit applied precisely that standard, finding H&V directed no additional conduct *toward Maryland*. Pet. App. 15a. Lesnick's generalized contentions that H&V designed "the product for national distribution" or that "Lesnick purchased cigarettes in Maryland as a result of H&V's joint efforts with Lorillard" make clear that the Fourth Circuit's conclusion was correct. Pet. 8. Again, only by imputing Lorillard's national distribution of its cigarettes to H&V and calling it a "joint" effort can any contacts with Maryland be claimed.[6]

In the court below Lesnick had argued that jurisdiction over H&V should exist since H&V had delivered its filter media into the stream of commerce with the expectation that Kent cigarettes using it would be purchased in the forum state. Pet. App. 14a. The Fourth Circuit noted, however, that the so-called "stream of commerce" rule is not as broad as Lesnick claimed. *Id.* Lesnick was seeking adoption of the rule that any time a party delivers a product into a stream of commerce, it must be foreseeable it will reach a forum state, thereby creating jurisdiction.

[6] This is Lesnick's characterization of H&V's activity. It is not the characterization made by either the district court or the circuit court, nor is it an accurate statement supported by anything in the record.

In fact, as this Court stated in *World-Wide Volkswagen*, by itself, mere "foreseeability" that the product would reach the forum state is not sufficient to establish jurisdiction over the seller. 444 U.S. at 295. As the Court noted, if mere foreseeability is the test, then a seller "appoints the chattel as his agent for service of process." *Id* at 296. The Fourth Circuit rejected Lesnick's contention that jurisdiction existed because it was foreseeable that H&V's filter media — once manufactured into cigarette filters by Lorillard — would be sold in Maryland by Lorillard. Pet. App. 15a. Indeed, only under the view expressed in the dissenting opinion in *World-Wide Volkswagen* (that given the inevitability of the stream of commerce reaching distinct locales foreseeability is enough to establish jurisdiction) can jurisdiction exist over H&V here.

Lesnick is, in effect, asking this Court to reverse *World-Wide Volkswagen* and its progeny and adopt the mere foreseeability test of the *World-Wide Volkswagen* dissent. That the Fourth Circuit declined to adopt this view, and instead applied existing law, provides no basis for a grant of certiorari.

Lesnick is arguing for adoption of a rule that would allow the assertion of personal jurisdiction over the supplier of a component of a product anywhere the final product is sold. The basis for creating this nationwide jurisdiction, according to Lesnick, is "reason and justice" and the convenience of plaintiffs in bringing their product liability claims in the jurisdiction in which they reside. Pet. 10. Only by abandoning the notion of a limit placed by the due process clause upon the jurisdictional reach of state courts can Lesnick's desired outcome of plaintiffs' always being able to sue in the jurisdiction of their residence be attained. As Lesnick puts it "plaintiffs will not be able to bring claims in the forum of their residence." Pet. 10. This, however, is an inevitable result, as long as there is a due process analysis that places any limits whatsoever upon the jurisdictional reach of state courts. If the due process clause limits state courts some of the time from

asserting jurisdiction over some defendants, then at least some plaintiffs will not be able to bring claims in the forum of their residence. Only by abandoning the minimum contacts analysis, and reversing the holding of *International Shoe*, can Lesnick's result be attained.

The rule sought by Lesnick is contrary to established law in two respects. First, it would allow jurisdiction over suppliers of component parts — always and in all instances — merely because of their status as component suppliers without regard to their actual contacts with the forum state. Second, Lesnick's nationwide jurisdiction is based upon "fairness" to a plaintiff and not upon the question of due process and fairness to the defendant. Lesnick asks for a broad expansion of personal jurisdiction effectively reversing *World-Wide Volkswagen* and its progeny, and indeed abandoning entirely the "minimum contacts" logic of *International Shoe*.

The Fourth Circuit's decision is a straightforward application of the rules in *International Shoe*, *World-Wide Volkswagen* and the plurality opinion in *Asahi*, as applied to the facts of this case, and the application for a writ of certiorari ought to be denied.

CONCLUSION

For the foregoing reasons, Respondent, Hollingsworth & Vose Company, respectfully requests that this Court deny Lesnick's petition for a writ of certiorari.

Respectfully submitted,

HOLLINGSWORTH & VOSE COMPANY

By its attorneys,

ALAN D. ROSE
Counsel of Record
ANDREW J. McELANEY, JR.
STEPHEN J. BRAKE
NUTTER, McCLENNEN & FISH
One International Place
Boston, Massachusetts 02110-2699
(617) 439-2000

January 18, 1995

Appendix Table of Contents.

Transcript of In-Chambers Conference Before the Honorable Frank A. Kaufman, United States District Court Judge App. 1

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BEVERLY LESNICK, Personal Representative of the Estate of Stanley S. Lesnick, Plaintiff,	*	Civil Action No. K-91-3
v.	*	
LORILLARD, INC. and HOLLINGSWORTH & VOSE, Defendants.	*	101 W. Lombard Street Baltimore, MD 21201 January 5, 1993

TRANSCRIPT OF IN-CHAMBERS CONFERENCE BEFORE THE HONORABLE FRANK A. KAUFMAN UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: HOWELL K. ROSENBERG, ESQUIRE
MARC SELDIN ROSEN, ESQUIRE

For Lorillard, Inc.: JAMES E. GRAY, ESQUIRE
WILLIAM S. OHLEMEYER, ESQUIRE

For Hollingsworth & Vose: ANDREW J. McELANEY, JR., ESQ.
STEPHEN J. BRAKE, ESQUIRE
S. ELIZABETH EVANS, ESQUIRE

Transcription Service: MONIQUE E. GIBSON
M.E.G. TYPING & TRANSCRIPTION

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

MR. MCELANEY: Your Honor, I do not think the factual record would support a finding that the Hollingsworth and Vose or Specialties or Lorillard were indeed a joint venture with respect to the manufacturing --

THE COURT: I never said they were. I said that plaintiff took the position that it was a joint venture. I don't think I said that I accepted that it was a joint venture, but if I did, I would tell you that don't think I need reach the question. But perhaps now that I think of it, I do. If it were a joint venture and a real joint venture, then you might have an agency. I don't think you had a joint venture for purposes of marketing. If that were so, for example, and I would ask plaintiff's counsel this question, if it were a joint venture, wouldn't an injured worker -- well, let's stay away from worker because we get into worker's compensation. Wouldn't a visitor to the Louisville plant of Lorillard or a visitor to the New Jersey plant of Lorillard who was injured due to negligence of a Lorillard employee be able to sue Hollingsworth as well as Lorillard on the basis that it was joint venture and that they were conducting an entire joint venture from start to finish? Who wants to answer that on plaintiff's side?

MR. ROSEN: You're asking if it's a personal injury on the plaintiff?

THE COURT: Yes, sure. If it's a joint venture between Hollingsworth and Lorillard, a visitor comes into the plant in New Jersey or in Kentucky, would the visitor be able to sue both on the grounds that everything that went on, from the start of the making of the filter up in Massachusetts, right through to the sale of the Kent cigarettes was a joint venture?

MR. ROSEN: Marc Rosen, and I would answer the question yes.

THE COURT: Well, it seems to me your answer speaks for itself in terms of the untenability of the position. All right. I think you're raising the joint venture point, the way you've raised it, Mr. McElaney, is healthy, and you've raised it more clearly, it seems to me, than it's raised in the memoranda. In the memoranda, the point and question was raised, of course, of agency which, in a sense, is the same thing that's raised in the question of the joint venture point. But the way we've come at it today, bringing this point clearly into focus, I'll hear from the plaintiff. Tell me about this joint venture. Well, I don't want to waste time. Just put that down as an item to be briefed too. And let's have some law on it, instead of jury speeches on what constitutes a joint venture.

And I would say this to plaintiff's counsel, I think you're getting close to frivolity in terms of the pushing of some of these positions. Please understand what I'm saying. I don't think this assertion of personal jurisdiction is frivolous. Anytime you have a court that's divided as the Supreme Court was in Ashi,[sic] and anytime you have views as those are stated as strongly as some of the justices stated in Ashi [sic] and in the preceding cases, the preceding Supreme Court cases, I don't think that good counsel could possibly do anything other than plaintiffs have done. But I think when you start to try to fit yourself into certain (inaudible) over precedent, and I don't think you can possibly have of what occurred here into a joint venture. And I think my example to you points that out. I just don't believe that where you have cooperation of the kind that you have here and the associations that we have here that the two companies that are involved in that association take on all the colorations of the other. Just as I find it hard to believe that that visitor to the Lorillard plant in Kentucky or the New Jersey plant of Lorillard could be sued if a visitor to the Hollingsworth plant in Massachusetts was injured and turned around and sued Lorillard as well as Hollingsworth.

There were certain things that were done in this case that were clearly the province of Lorillard and clearly the province, on the other hand, of Hollingsworth. Hollingsworth decided how to run its plant and designed the structure. Lorillard decided how to run its plant. Does the defendant Hollingsworth take any different position?

MR. MCELANEY: Andrew McElaney. No, Your Honor.

THE COURT: Does Lorillard counsel want to be heard on this? Do you take any different position?

MR. OHLEMEYER: No, sir, Your Honor. William S. Ohlemeyer.

THE COURT: All right. If you want to brief this, you can. You're pressing this joint venture issue. I have to say, with all due candor to plaintiffs, that what's come out of this healthy discussion Mr. McElaney engendered is that to be very honest, gentlemen, you made a jury speech to me, and I didn't realize it. Your memoranda on joint venture just goes on as if you were talking to a jury. But you've got to analyze case law and governing case law, whatever that is under choice of law to show that there was a joint venture, because a joint venture means, I think, just was Mr. Rosen's candid answer to this Court's question, what's that? What else, Mr. McElaney?

MR. MCELANEY: Your Honor, I don't have anything further.

(3)

SUPREME COURT, U.S.
FILED
JAN 31 1995
OFFICE OF THE CLERK

No. 94-1085

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

BEVERLY LESNICK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY S. LESNICK,

Petitioner,

v.

HOLLINGSWORTH & VOSE COMPANY,

Defendant-Respondent,

and

LORILLARD, INC.,

Defendant.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Steven J. Cooperstein, Esquire
Howell K. Rosenberg, Esquire
BROOKMAN, ROSENBERG, BROWN & SANDLER
30 S. 15th Street, 17th Floor
Philadelphia, PA 19102
(215) 568-4000

Marc Seldin Rosen, Esquire
SCANLAN & ROSEN, P.A.
210 East Redwood Street, 3rd Floor
Baltimore, MD 21202
(410) 244-1155

Attorneys for Petitioner Beverly Lesnick

Counsel of Record:
Steven J. Cooperstein, Esquire

PACKARD PRESS® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-8000

400

No. 94-1085

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

BEVERLY LESNICK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY S. LESNICK,

Petitioner,

v.

HOLLINGSWORTH & VOSE COMPANY,

Defendant-Respondent,

and

LORILLARD, INC.,

Defendant.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ARGUMENT

Respondent, Hollingsworth & Vose Company ("H&V"), has filed a Brief in Opposition to the Petition for Writ of Certiorari. In its Brief, H&V denies that the opinion of the court below conflicts with *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir.), *cert. denied*, 114 S.Ct. 304 (1993), and *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir.), *cert. denied*, 113 S.Ct. 2334 (1993). H&V argues that the ground for distinction between the instant case and those two opinions is that H&V exercised no control over the means of distribution of the finished

cigarette into which its filter media was incorporated, while defendants in the cited cases did exercise some means of control. This contention utterly misperceives the clear basis of the opinion below – that although H&V cooperated with Lorillard to produce a cigarette with successful national sales, the failure to prove that H&V acted specifically with Maryland in mind is fatal to the exercise of personal jurisdiction there.

Further, the argument put forth by H&V, if a correct interpretation of the opinion below, reinforces the need for grant of certiorari in the instant case. H&V advances the view that the Fourth Circuit Court of Appeals was correct in finding an absence of personal jurisdiction because the *sine qua non* to a finding of "purposeful availment" is some measure of control of a product's distribution system. It is plain, however, that this Court's cases in the area have never imposed such a requirement. It is precisely this misunderstanding of this Court's decisions, particularly the plurality in *Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), that cries out for review of the Fourth Circuit opinion.

H&V spends much time in its Brief in Opposition portraying Petitioner's position as one dependent upon imputing Lorillard's marketing decisions to H&V. Nothing could be further from the truth. Petitioner asserts that jurisdiction is proper over H&V because of H&V's actions well before the distribution stage. H&V's absence of control over the distribution of Lorillard's finished product is irrelevant here, given the depth of H&V's involvement in the production of a cigarette sold nationwide. Neither is it Petitioner's position that the closeness between H&V and Lorillard made Lorillard a *de facto* agent of H&V for jurisdictional purposes. Rather, Petitioner asserts that H&V's virtual partnership with Lorillard in designing a cigarette filter that would be a national seller establishes that H&V intended to purposefully avail itself of the national market.

As the plurality in *Asahi* implicitly recognized, getting a product to market includes much more than simply controlling a system of distribution. That is why the *Asahi* plurality included the design of a product in its examples of "addtional conduct" that may prove an intent to purposefully avail oneself of the market in a forum. 480 U.S. at 112. Here, the abundance of evidence show-

ing, among other things, H&V's intimate involvement in the development of the filter used on the Kent cigarettes and its efforts to refine the filter to gain the widest possible consumer acceptance established that H&V engaged in conduct intended to take advantage of the cigarette market in all of the states, including Maryland.

Finally, H&V ignores the record and misrepresents the nature of Petitioner's argument in asserting that Petitioner seeks a rule allowing exercise of personal jurisdiction over the supplier of a component part anywhere the finished product is sold. As the courts below recognized, H&V was far from a mere component part supplier. *See* Appendix to Petition for Writ of Certiorari at 14a-15a, 23a-24a. Indeed, the district court found that H&V and Lorillard "... did jointly meet and do everything they could to work together to develop, manufacture, and sell." *Id.* at 24a. Petitioner advocates merely that she should be permitted to sue a party that is intimately involved in bringing a product to market in any state in which the product is distributed, notwithstanding the party's absence of control over the distribution system. Such a rule would be entirely in keeping with this Court's precedents on the issue of the constitutional exercise of personal jurisdiction.

For the foregoing reasons, as well as the reasons contained in the Petition for Writ of Certiorari, Petitioner, Beverly Lesnick, respectfully requests that the Petition be granted.

Respectfully submitted,

BROOKMAN, ROSENBERG, BROWN AND SANDLER

By:_____

Steven J. Cooperstein
Howell K. Rosenberg

Marc Seldin Rosen
SCANLAN & ROSEN, P.A.

Attorneys for Petitioner, Beverly Lesnick